IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25836

FRED G. HAYDEN, d/b/a HOUSTON INTERNATIONAL AIRPORT LIMOUSINE SERVICE,

Appellant,

versus

A. G. BOWEN, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(November 26, 1968)

Before GEWIN, PHILLIPS* and GOLDBERG, Circuit Judges.

GEWIN, Circuit Judge: The appellees, former employees of Houston International Limousine Service, brought this action in the United States District Court for the Southern District of Texas to recover unpaid minimum wages and overtime compensation under

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*Judge Harry Phillips of the Sixth Circuit, sitting by designation.

the Fair Labor Standards Act of 1938 as amended.[1] The primary question presented is whether the appellees were engaged in "commerce" within the meaning of the Act. The district court answered this question in the affirmative and ruled against the limousine service on its subsidiary contentions. We affirm.

Houston International Airport, located within the city near its southern boundary, is approximately eleven miles from downtown Houston. During the period relevant to this suit transportation between the airport and points within the city was provided primarily by taxicabs, limousines, and private automobiles. With the exception of chartered buses on a few occasions, no public transit system served the airport. Houston International Limousine Service, owned by appellant Hayden, operated out of the airport under a franchise granted by the city of Houston, which owns and operates the airport. The franchise permitted Hayden to transport persons from the airport to hotels, offices, and apartment buildings within the city and from these points to the airport.[2] The director of the city's department of aviation designated the specific pickup and delivery points.

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[1] 29 U.S.C. §§ 201-219 (1964).

[2] In addition to its regular business of transporting airline passengers and personnel, the limousine service also carried intra-company mail for the airlines between their airport and downtown offices, delivered mishandled luggage from the airport to the owner's hotel and, on occasion, carried passengers whose flights had been grounded in Houston to their scheduled destinations or to a point where they could obtain a non-grounded flight.

The franchise required that Hayden provide air conditioned limousines around the clock in sufficient numbers to meet the demand for ground transportation resulting from scheduled incoming and outgoing flights, and that the service be so spaced that under normal conditions no more than one hour would elapse between the arrival of a scheduled aircraft and the arrival of its passengers at the designated points in the city, or between the departure of passengers from any designated point in the city and the departure of the aircraft. Additionally, the franchise directed that the limousines be used exclusively to provide public airport ground transportation services. Fares were also fixed by the franchise.

Section 3(b) of the Fair Labor Standards Act provides:

> "Commerce" means trade, commerce, transportation, or communications among the several States or between any State and any place outside thereof.[3]

Whether an employee is engaged in commerce is determined by practical considerations, not by technical concepts. The test is whether the employee's work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be a part of it, rather than isolated local activi-

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[3] 29 U.S.C. § 203(b) (1964).

ty.[4] It is established in this circuit that the Act is to be given a liberal interpretation.[5]

Hayden contends that the Supreme Court's holding in *United States v. Yellow Cab Co.*[6] dictates the conclusion that the appellees were not engaged in commerce. In *Yellow Cab* the Court declared, after examination of the practical considerations involved, that taxicabs which carried passengers from their hotels, homes, and offices in Chicago to the railroad station, and conversely, were not an integral part of interstate commerce because their relation to interstate transit was too casual and incidental. An analysis of the facts which the Court considered in reaching its result makes it obvious, however, that *Yellow Cab*

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[4]Mitchell v. C. W. Vollmer & Co., 349 U.S. 427, 429 (1954).

[5]Mitchell v. Empire Gas Eng'r Co., 256 F.2d 781, 784 (5th Cir. 1958). The broad construction given "commerce" by a growing accumulation of cases has brought within the Act's reach a varied assortment of employees. *See* Mitchell v. Lublin, McGaughy & Assoc., 358 U.S. 207 (1959) (employees of an architectural firm who prepared plans and specifications for air bases and other interstate instrumentalities); Allen v. Atlantic Realty, 384 F.2d 527 (5th Cir. 1967) (building service and maintenance employees of realty company which leased premises to interstate telephone company); Wirtz v. Atlantic States Construction Co., 357 F.2d 442, 447 (5th Cir. 1966) (employees of a construction company building an improvement to a port facility); Wirtz v. B. B. Saxon Company, 365 F.2d 457, 461 (5th Cir. 1966) (employees of an independent company which had contracted to repair vehicles used in operation of an air base); Wirtz v. P & L Equipment Co., 311 F.2d 88 (5th Cir. 1962) (night watchman employed by a company constructing a city street used by trucks carrying mail and other interstate cargo); Public Housing Auth. of B'ham. v. Goldberg, 298 F.2d 365 (5th Cir. 1962) (building service and maintenance employees in building which was leased to federal agencies and in which federal employees produced goods for commerce.

[6]332 U.S. 218 (1947).

does not govern the fact situation presented by the case *sub judice*. The taxicabs in that case did not serve railroad passengers exclusively; quite the contrary, they were required to serve every person within the city. The cabs were under no contractual duties relating to rail movement. Railroad travelers had complete freedom to arrive at or leave the station by cab, trolley, bus, subway, elevated train, private automobile or various other means of conveyance. The present case is hardly analogous. Hayden's limousine service was an important means of ground transportation available to travelers. But of greater significance is the fact that air travel, predominantly interstate, into and out of the Houston International Airport was the very lifeblood of the limousine service and, with few exceptions, the exclusive source of its patronage. The limousine service worked hand-in-glove with the airlines. Coordination of flight schedules with Hayden's operation was vitally important to both enterprises. Hayden's dispatchers would acquire from the airlines the number of passengers who needed transportation from their respective hotels to the airport and then dispatch the proper number of limousines to the hotels. And when a flight schedule was changed, notice of the change was sent to the limousine office. Thus it is clear that the *Yellow Cab* case is no authority for holding that Hayden's limousine operation was only casually or incidentally related to interstate transit. The essential nature of Hayden's business was the transportation of airline passengers to and from the Houston International Airport.[7]

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[7]Hayden testified during the trial as follows:

Q. Isn't the essential nature of your business to get those

Hayden places great reliance upon *Mateo v. Auto Rental Co.*,[8] in which the Ninth Circuit held that employees of Auto Rental, who were engaged in transporting airline passengers between the Honolulu Airport and downtown districts, were not as a practical matter involved in interstate movement. There are, however, important dissimilarities between the facts in that case and the facts in the case before us. Auto Rental did not operate under the strictures of a franchise. The company determined its own pickup and delivery points, was under no obligation to coordinate its activities with flight schedules, and was free to use its limousines for purposes unrelated to airport transportation. And, unlike Hayden's operation, it was engaged in stiff competition with other "airporter" systems. Whether this court would have reached the *Mateo* result on these facts is a question we need not decide. But we have no difficulty in concluding that *Mateo* should not govern the result in the present case.

The facts in this case are not significantly different from those upon which the Fourth Circuit based its finding in *Airlines Transp., Inc. v. Tobin*[9] that a limousine service operating out of the Raleigh-Durham Airport was engaged in commerce. Airline Transportation had contracted with three airlines to provide their passengers with ground transportation between the

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passengers in and out of that airport?

A. And we do.

Q. That's the essential nature of your business?

A. Yes.

[8] 240 F.2d 831 (9th Cir. 1957).

[9] 198 F.2d 249 (4th Cir. 1952).

airport and downtown points designated by the airline companies. The limousines were to be used exclusively in this service. The municipalities of Raleigh and Durham fixed the fares to be charged. In addition to the limousines, commercial transportation to and from the airport was available by bus and taxicab. By their contracts, the airlines had much the same control over limousine operations as did the city of Houston by its franchise. We do not view the absence of comprehensive contractual ties between Hayden and the airlines as a basis for factually distinguishing the two cases because the terms of the franchise sufficiently obligate Hayden to provide the service which was the object of the airlines contracts in *Tobin*.

The result in *Tobin* and the conclusion which we reach in this case are supported by the Supreme Court's decision in *United States v. Capital Transit Co.*[10] Residents of the District of Columbia who worked in government offices in Virginia daily boarded local buses near their homes which took them to a terminal within the District, where they changed to different buses which then took them on to Virginia. The Court held that the passengers' interstate journey to work actually began at the time they boarded the first bus near their homes and ended when they alighted from the bus at their place of employment in Virginia. The Court acknowledged that the interstate trip was broken at the terminal but concluded that, in the "commonly accepted sense of the transportation concept,"

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[10] 325 U.S. 357 (1945).

the entire trip was interstate.[11] Although this case is a pre-*Yellow Cab* decision, the Court has pointed out in a subsequent opinion that *Yellow Cab* does not conflict with the *Capital Transit* case.[12]

Hayden contends further that he was exempt from the requirements of the Act even if the appellees were engaged in commerce, because his limousine service was a local motor bus carrier and, therefore, exempt from the minimum wage and hour requirements.[13] We agree with the Wage and Hour Administrator that

> [t]he indispensable characteristic of a local motor bus carrier is that it is a carrier which serves an integrated commercial or industrial area for the purposes of carrying persons to and from their work in offices and factories, children to and from school daily, and other persons attending to necessary routine business.[14]

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[11]325 U.S. at 363.

[12]United States v. Capital Transit Co., 338 U.S. 286, 290 (1949).

[13]Section 13(a)(9) of the Act, 29 U.S.C. § 213(a)(9) (1964), prior to the 1966 amendments provided:

> The provisions of sections 206 and 207 of this title [relating to minimum wage and hour requirements] shall not apply with respect to—
>
> any employee of a street, suburban or interurban electric railway, or local trolley or motor bus carrier, not in an enterprise described in section 203(s)(2) of this title.

[14]Wage & Hour Release, March 6, 1944, 1 CCH 1968 Lab. L. Rep. Wages & Hours ¶ 25,266.05, at 38,604. *See* Gillette v. Rockland Coaches, 142 F.2d 616, 618-19 (2d Cir. 1944).

This definition accords with the ordinary and commonly understood meaning of the term "local motor bus carrier." We think it manifest that Hayden's limousine service did not fall within the terms of the definition and, therefore, that it was not exempt from the minimum wage and hour provisions.[15]

Hayden argues, alternatively, that even if the appellees were covered by the Act, the tips which they received in the performance of their duties should be computed in determining their minimum wages. The Act originally made no reference to tips in defining the term "wages."[16] In spite of this, however, the courts construed the statute to permit consideration of tips in computing the amount of minimum wages and overtime compensation.[17] But in each of the cases which have held that tips must be considered, there has existed an agreement between the employer and the employee that tips should be kept by the employee as compensation. We believe the language of these cases implies that in the absence of such an agreement tips should not be considered in computing an employee's minimum wage. The district court found that Hayden

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[15] *See* Wirtz v. Cincinnati, Newport and Covington Transp. Co., 375 F.2d 513 (6th Cir. 1967); and Yogurt Master, Inc. v. Goldberg, 310 F.2d 53, 55 (5th Cir. 1962).

[16] The appellees' claims are based on violations of the Act which occurred during the period from June 21, 1961 to February 12, 1965. The Act was amended in 1966 to permit employers to consider tips in computing wages for purposes of the minimum wage and hour provisions. 29 U.S.C. § 203(m) (Supp. 1966).

[17] Williams v. Jacksonville Terminal Co., 315 U.S. 386, 397 (1942); Moyd v. Atlantic Greyhound Corp., 170 F.2d 302, 303 (4th Cir. 1948); Southern Ry. v. Black, 127 F.2d 280, 284 (4th Cir. 1942). *See also* Annot., 65 A.L.R.2d 974 (1959).

did not have an understanding with his employees that tips would be a part of their compensation and we reject Hayden's contention that this finding is clearly erroneous.[18]

Finally, Hayden contends that the court's award of attorney's fees to the appellees' counsel should have been made conditional upon counsel's surrender of all rights to additional compensation which might exist under a contingent-fee contract with the appellees. We need not reach this contention. The contractual arrangements between employees and their counsel are their concern and the employer has no standing to seek the disruption of those arrangements.[19] The appellees, apparently satisfied with their counsel's representation to the district court that he would credit the award to the contingent-fee amount, express no disenchantment with the court's award and, therefore, we see no reason to tamper with it.

We have considered all of the contentions urged by the appellant and find them without merit.

AFFIRMED.

11 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

A. G. BOWEN, ET AL	)	
	)	
VS.	)	C.A. 63-H-366
	)	
FRED G. HAYDEN, d/b/a HOUSTON INTERNATIONAL AIRPORT LIMOUSINE SERVICE	)	

MEMORANDUM OPINION.

Filed Sept. 28, 1967.

(Title Omitted.)

This is a suit for unpaid minimum wages and overtime compensation under the Fair Labor Standards Act of 1938, as amended, Title 29, Section 201, et seq., U.S.C.A.

Plaintiffs, former employees of the defendant, are residents and citizens of Houston, Harris County, Texas and the defendant, Fred G. Hayden, is the sole proprietor of the Houston International Airport Limousine Service, with an office at 1702 Lamar Street, Houston, Texas.

Plaintiffs' cause of action for reinstatement and reimbursement for lost wages resulting from their alleged unlawful discharge has been severed from this

suit involving unpaid minimum wages and overtime compensation.

The primary question is whether the defendant and his employees were engaged in commerce as contemplated by the Act. Further, the defendant maintains that even if his operations are covered by the Act, he is exempt from the minimum wage and overtime compensation provisions of the Act because he is engaged in the business of operating taxicabs (29 U.S.C.A. 213(a)(12)) or because he is a local motorbus carrier. (29 U.S.C.A. 213(a)(9).)

The defendant employed the following plaintiffs as limousine drivers, checkers, starters, and dispatchers at certain times during the period from June 20, 1961, to February 12, 1965:

A. G. Bowen, Howard V. Brown, Frank Couell, Everett Dennis, J. P. Dunn, Bennie Horowitz, Clyde Hollinger, Arthur J. Laird, G. E. Pippin, L. A. Reid, Wayne R. Snyder, James K. Zimmerman, Joseph Leger, Richard Moore, H. I. Dobbs, David O. Carter, Seaborn Fuller, James H. Gray, James K. Grote, J. E. Hollis, C. T. Moore, W. E. Taylor and W. L. Taylor.

Those plaintiffs employed as drivers by the defendant had as their primary duty the driving of the airport limousines between the Houston International Airport and various specified pickup locations in the City of Houston.

Plaintiffs employed by the defendant as starters were stationed at the Houston International Airport

and their primary duty was to direct the loading of defendant's limousines with passengers who had arrived at the Houston International Airport via airplane from points within and without the State of Texas. When a limousine was loaded, the starter would dispatch them to one or more of the specified pickup locations in the City.

The duty of a dispatcher at defendant's downtown office was primarily to correlate the various calls for limousine service to meet outgoing airplane flights and dispatching the limousines to the specified pick-up locations in the City. There, the passengers were picked up at times scheduled to properly coincide with the airplane flights from the airport destined for points within and without the State of Texas.

Within the period from June 30, 1961, to February 12, 1965, plaintiffs who were employed by the defendant as drivers, received as their only compensation from defendant an hourly wage rate of $1.00 per hour; that during said period the Plaintiffs who were employed as checkers received as their only compensation from defendant an hourly wage rate of $1.10 per hour; that during said period the plaintiffs who were employed by the defendant as starters received as their only compensation from the defendant an hourly wage rate of $1.44 per hour; and, during said period the plaintiffs who were employed as dispatchers received as their only compensation from defendant an hourly wage rate of $1.44 per hour.

Further, it is obvious and clear to this Court that the drivers, checkers, starters and dispatchers were

not compensated at a rate of one and one-half times their hourly rate for the hours they worked in excess of forty (40) hours a work week.

Although the testimony was conflicting, the defendant did not, as he contends, have an explicit or implicit understanding with any of the plaintiffs that the tips that each of the plaintiffs collected in the course of his employment were to be considered as part of his wages nor did any agreement exist between the defendant and the plaintiffs that tips should be kept by the plaintiffs as compensation for their services. Indeed, under the terms of the 1962 Ordinance (62-497(5)(k) granting the franchise it is expressly provided that the tipping of drivers by air traveling passengers will not be fostered or encouraged by the defendant. Not every gratuity given a worker in the course of his employment should be considered a part of his wage. Whether tips should be considered as part of an employee's wages should be governed by the circumstances. Williams, et al. v. Jacksonville Terminal Company, 315 U.S. 386, 397, 398, 62 Sup. Ct. 659, 669, 670, 86 L. Ed. 914 (1942). In the present case, the drivers, checkers, dispatchers and starters were paid a salary, the adequacy of which is a question at issue here. Therefore, under the employment arrangement at hand, tips should not be considered as part of the plaintiffs' wages. Lloyd v. Parziale, 23 C.C.H. Lab. Cas. 67537 (N.Y. C.Ct. 1952), affd. 203 Misc. 399, 119 N.Y.S. 2d 62; see A.L.R. 2d 968.

During the period for which unpaid wages and overtime conpensation are sought, defendant, d/b/a Houston International Airport Limousine Service.

was engaged in the business of transporting airline passengers, airline personnel, luggage, and airline company mail from the airport to various specified pickup locations in the city and from such locations to the airport.

Upon the basis of competitive bidding, defendant was granted two separate franchises from the City of Houston which took the form of two city ordinances. The first (No. 57602) was in effect from June, 1961, to June, 1962; the second (No. 62-477) was in effect for the remainder of the relevant period.

No other person or firm was franchised or authorized by the city to operate such a transportation service and none in fact existed during the relevant period. The two franchises provided explicitly that they were granted by the city to provide a means of ground transportation for persons using the airport. This was to the end that such persons with their baggage could reasonably be assured of getting from the airport to points within the city and vice-versa with minimum difficulty and inconvenience and at a fair and reasonable rate.

The right and privilege granted by the city to defendant was interpreted by the applicable ordinances to mean only the scheduled ground transportation service designed to accommodate passengers arriving and departing by scheduled air transportation service at Houston International Airport.

Both franchises provided that the service contemplated would require defendant to provide sufficient

vehicles of certain specified type to meet the demand for schedules of ground transportation twenty-four (24) hours a day, seven (7) days a week for all incoming and outgoing flights of the airlines serving the airport.

Section 5(i) of the 1962 franchise specified that the schedules of service of defendant's limousines would be spaced so that under normal conditions no more than one hour should elapse between an arrival of a schedule aircraft at the airport and the delivery of its passengers at the various specified pickup points in the city or between the departure of passengers from the various specified pickup points in the city and the departure of the aircraft from the airport.

In addition the franchise granted to the defendant such privileges at the airport as parking space and the right to make announcements over the public address system.

To comply with the franchise and ordinance requirements, the defendant scheduled the departure of its limousines from the airport and from the pickup points in the city so as to complement and coordinate with the arrival and departure times of flights of scheduled airlines. Defendant obtained continual information on the airlines' arrival and departure schedules, and, when the need arose, adjusted its own limousine schedules to conform with any changes in airline schedules, thereby providing continuing coordination between the airline schedules and defendant's operations.

The specified pickup points in the city were designated by the City Aviation Director: These pickup points, located approximately eleven miles from the airport, were in three general areas: the downtown area, the uptown area, and the South Main area. Drivers of the defendant's limousines were given suggested routes from the airport to the downtown or uptown areas, which they normally followed, but the drivers were allowed to, and they did, depart from the suggested routes in the case of traffic congestion or other conditions which made it desirable to do so in the driver's opinion. Defendant's limousines did not, however, deviate from their suggested routes for the purpose of dropping off a passenger at his individual destination. Defendant provided transportation only between the airport and the specified pickup points. While following the normal routes to service the pickup points in a given area, the limousines did not stop at pickup points unless scheduled to pick up a passenger.

In addition to the synchronized schedules of the defendant and the airlines, the defendant's operations were further harmonized with the airlines by the practice of defendant's dispatchers calling the airlines to determine if any of the airline passengers needed to be picked up by the defendant. Conversely, the airlines notified the defendant when their scheduled arrival and departures were delayed, and a majority of the reservations on the limousines were made by the airlines calling the defendant's dispatcher's office.

Airline personnel were charged a reduced rate of 75c per trip for the transportation of flight crews to

and from the airport. This reduced rate was specified in the 1962 franchise. All airlines made use of defendant's limousines. Three airlines made special arrangements with defendant for the exclusive use of a limousine to transport their crews at the rate of $7.50 per trip.

In the course of its regular operations, the defendant also carried company mail for various airlines operating out of the airport for remuneration. This mail was delivered to and picked up from the airlines' downtown and airport offices. A large portion of this mail was received from and destined to their offices outside the State of Texas and transported by the airlines' scheduled interstate flights.

The defendant transported luggage or other baggage for the airlines between their airport offices and downtown offices. When the airlines mishandled the luggage of their passengers, and subsequently located such luggage, airline personnel would deliver the luggage to the defendant's limousine starter at the airport. Defendant would then transport said luggage to a hotel at a charge for each individual service which was paid by the airline. A charge slip would be issued to defendant's starter on such occasions and the charge would be billed the airlines on a monthly basis.

During the relevant period, the defendant, as part of his service, would transport both interstate and intrastate passengers whose flights had been grounded in Houston because of weather or other conditions to their schedule destinations or to another point where

they could get a flight out of an airport that was not fogged in or grounded. The airline whose flight was grounded would make arrangements with the defendant for the transportation of their stranded passengers to points outside Houston. Passengers continued interstate journeys under such arrangements to Austin, Lufkin, San Antonio, College Station, and other Texas Cities. Also on two occasions the defendant provided transportation for passengers whose flights were interrupted in Houston to points in Louisiana.

The drivers who transported company mail, misplaced luggage, or transported passengers outside of the City of Houston were compensated at the same rate as drivers transporting passengers to and from the airport to the downtown areas; and the duties of each of the individuals involved in performing these services were combined in defendant's operation.

The terms of the 1962 franchise provided that the automobile equipment used by the defendant shall be used exclusively to provide public ground transportation service at the Houston International Airport, and such automobile equipment, personnel and service shall not be utilized for any other purpose without prior approval of the City Council.

During the relevant period, the defendant was engaged in no other business than transporting airline passengers, packages, airline mail, and luggage. The defendant, however, in certain isolated instances, would rent its limousines for private purposes such as weddings; these instances constituted but a small

part of the revenue of the defendant's limousine service.

The plaintiffs, employees of Fred G. Hayden, d/b/a Houston International Airport Limousine Service, were engaged in commerce within the meaning of the Act during the relevant period. Defendant's limousines were used exclusively for transporting airline passengers to and from the Houston International Airport and points located in downtown or uptown Houston, an approximate distance of eleven miles. The airport was not serviced by any public transportation system during the period in question; the nearest public bus stop being located about one and one-half miles from the terminal entrance.

In each year of the relevant period, the defendant transported over 200,000 passengers to and from the airport, and a substantial majority arrived at the airport from points outside the State of Texas or departed for points outside the State of Texas.

In view of the defendant's relation with the various airlines, the necessities and circumstances in providing interstate airline passengers with transportation to and from the airport, the interstate movement began when the passenger entered defendant's limousine to be carried to the airport, and conversely, when he was carried from the airport to a previously designated stopping point. It is clear then, that during the period in question, the defendant's operations were an integral part of the incoming and outgoing interstate airline traffic of the City of Houston. Airline Transportation, Inc. v. Tobin, 198 F. 2d 249, 251

(4th Cir. 1952); see Mitchell v. Lublin, 358, U.S. 207 (1959) McLeod v. Threlheld, 319 U.S. 491 (1943); U.S. vs. Capitol Transit Co., 325 U.S. (1944); Caserta v. Home Lines Agency, Inc. 273 F. 2d 943, 945, 946 (2nd Cir. 1959).

Not only were defendant and the plaintiffs-employees engaged in commerce within the meaning of the Act, but the defendant has failed to prove that he was operating as a local motorbus carrier within the meaning of the Section 13(a)(9) exemption. The defendant contends that if plaintiffs are employees engaged in commerce, defendant is exempt from the minimum wage and overtime compensation requirement because his limousine service is a local motorbus carrier.

The defendant used in his operation Cadillac Limousines with a maximum seating capacity of seven (7) which were licensed as automobiles, and an eleven (11) passenger limousine called an "Aerobus", manufactured by the Checker Company. The Cadillac and Aerobus limousines had adequate luggage and trunk space to accommodate a full load of passengers and had no aisles to accommodate standers.

Although defendant's limousines were only allowed to make stops at those hotels and motels in the downtown and uptown areas designated by the City of Houston Aviation Director, defendant's limousines were not required to follow a fixed route and did not stop at designated "stops" spaced a given number of feet along the city streets in order to effectively serve the populace at large as do local

motorbuses. In further contra-distinction, defendant charged a standard rate for his services; $1.50 for adults and 75% for children and airline personnel; whereas the fares charged by Rapid Transit, a local motorbus franchised by the city, varied from zone to zone and did not exceed 33c during the relevant period.

Because defendant's operations were limited by franchise solely to the transportation of passengers and luggage to and from the airport and because defendant was required by said franchise to coordinate with airline schedules and to limit his operations to various specified pickup points located in the City of Houston, defendant's limousine service was not intended to and did not render daily common carrier passenger service as a part of the transportation system of the locality. The specialized transportation provided by the defendant, integrated as it was with the interstate commercial airline schedules, lack the necessary indicia of a local motorbus carrier as enumerated in Gillette v. Rockland Coaches, Inc., 142 F. 2d 616, 619, 620 n.1 (2nd Cir. 1944).

Furthermore, it cannot be said that the defendant is exempt from the Act because he was engaged in the business of operating taxicabs within the meaning of 29 U.S.C.A. 13(a)(12). Defendant's transportation service was not available to the public as to time or destination in order to serve the customer's personal convenience. Defendant's limousine drivers were not free to organize their own time nor to exercise initiative to secure necessary patronage. Defendant's limousines were used for the sole purpose

of providing ground transportation to and from the airport and were not available as a part of the general transportation system of the community. The limousine service was available to the general public only for traveling to and from the airport in coordination with the airline flight schedules. The limousines were unmetered, did not have vacancy signs, and did not advertise as taxicabs; they did not stand and wait for passengers, except at the airport, where they awaited the arrival of airline flights. The number of drivers on duty at any given time was determined by defendant in advance by using schedules of arrival and departure of scheduled flights of airlines. Thus defendant's operation also lack the necessary indicia to render him exempt from the Act under the taxicab exemption. Airlines Transportation, Inc. vs. Tobin, supra; Wirtz v. Cincinnati, Newport and Covington Transportation Co., 375 F. 2d 513 (6th Cir. 1967).

Exemptions under the Act are to be narrowly construed and the defendant has failed to sustain the burden of proving that his operations and his employees were exempt from the minimum wage and overtime compensation of the Act, 29 U.S.C.A. 206, 207; see Arnold vs. Ben Kanowsky, Inc., 361 U.S. 388, 80 S. Ct. 453, 4 L. Ed. 2d 393 (1960); Airlines Transportation, Inc. v. Tobin, supra.

The defendant has failed to comply with Sections 206 and 207 of the Fair Labor Standards Act of 1938, as amended, Title 29, and the plaintiffs are entitled to unpaid minimum wages and overtime compensation during the relevant period.

The defendant did not keep records of the hours worked each work day and the total hours worked each week for any of the plaintiffs, nor did he keep any records of the daily or weekly total earnings or wages. The only records kept by the defendant reflect total wages paid each plaintiff for a bi-weekly period.

In failing to make, keep and preserve accurate records of the number of hours worked by the plaintiffs each work week, defendant violated Sections 211 (c) and 215(a)(5) of the Act, and cannot be heard to complain that the plaintiffs' claims under the Act are based upon evidence that is too uncertain or imprecise. Anderson vs. Mt. Clemons Pottery, 328 U.S. 680 (1945); Mitchell v. Mitchell Truck Line, Inc., 286 F. 2d 721 (5th Cir. 1961).

Plaintiffs have performed work for which they were improperly compensated. A just and reasonable inference based upon the evidence produced by plaintiffs from the available records of the defendant can and must be drawn to determine the amount which the various plaintiffs are entitled to recover. Counsel has suggested that in the event the employee-plaintiffs are covered by the Act and liability attaches that the Court may relieve itself of the mathematical computation by affording counsel two (2) weeks in which to present to the Court an agreed statement of individual recovery. If such agreed figures cannot be submitted by the parties within two weeks from this date, both parties are granted leave to submit their proposed calculations which they believe the Court should accept in accordance with the appli-

cable rules of law. In this event, the Court will then make its own calculations in a supplemental memorandum.

The defendant has shown to the satisfaction of the Court that he was in good faith and had reasonable grounds for believing that his acts or omissions were not a violation of the Act. Under these facts, the Court will not award any liquidated damages.

In support of their claim for reasonable attorneys' fees as provided by the Act, plaintiffs' attorneys showed that they spent 247 hours in pretrial preparation over a period of approximately three and one-half years. Plaintiffs' attorneys diligently represented their twenty-three clients in drafting pleadings and interrogatories, attending depositions, preparing briefs, etc., in numerous pretrial proceedings; and, in the three day trial of the case. The plaintiffs contend that the sum of $8,500.00 would be a reasonable and proper amount for attorneys' fees. Defendants contend that plaintiffs' attorneys were employed under a contingent fee contract entitling them to one-third of the amount recovered for the plaintiffs, and, further, that the plaintiffs' attorneys were not contractually obligated to reimburse plaintiffs from any attorney fees awarded by the Court. Plaintiffs' lead counsel, however, testified that he will credit any attorneys fees awarded by the Court to the contingent fee amount.

In considering the time spent by counsel, counsel's ability, the nature of the case, the expenses necessarily incurred and the character of the efforts

required, plaintiffs are entitled to recover the sum of $4,500.00 as reasonable attorneys' fees.

This memorandum opinion constitutes the findings of fact and conclusions of law of this Court. The clerk will send copies of this memorandum to all counsel.

Dated at Houston, Texas, this 28th day of September, 1967.

WOODROW SEALS,
United States District Judge.